St. Francis Hospital *and* St. Francis Federation of Nurses and Health Professionals, affiliated with the Wisconsin Federation of Nurses and Health Professionals, affiliated with the American Federation of Teachers, AFL-CIO

Modern Management, Inc. *and* St. Francis Federation of Nurses and Health Professionals, affiliated with the Wisconsin Federation of Nurses and Health Professionals, affiliated with the American Federation of Teachers, AFL-CIO. Cases 30-CA-5607 and 30-CA-5698

August 31, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 3, 1982, Administrative Law Judge George Norman issued the attached Decision in this proceeding. Thereafter, Respondents, the General Counsel, and the Charging Party filed exceptions and supporting briefs, and Respondent Modern Management, Inc., the General Counsel, and the Charging Party filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[4]

1. The Administrative Law Judge found that Respondent St. Francis Hospital (hereafter the Hospital) violated Section 8(a)(1) of the Act by its antiunion campaign. Respondents except to this finding, contending that the antiunion campaign was lawful. We find merit in this exception, to the limited extent stated below.

Although we agree with the Administrative Law Judge's findings, except as specified *infra*, that the Hospital committed violations of Section 8(a)(1) during its antiunion campaign, it does not follow that these violations somehow taint the entire campaign such that the entire campaign, including parts which are not in and of themselves violative of the Act, is rendered violative of the Act. Any party to an election has a right to conduct a vigorous campaign in support of its position, including the utilization of individual and group meetings with employees. See *Hasbro Industries, Inc.*, 254 NLRB 587 (1981). Further, the Board has recently refused to find employer statements, which individually were unobjectionable, to be objectionable by virtue of their repetition. *Blue Cross of Kansas City, Inc. and Blue Shield of Kansas City, Inc.*, 259 NLRB 483 (1981). Although the Hospital's campaign was marked by numerous and massive unfair labor practices, which, as indicated below, require a bargaining order, we find that not every facet of the campaign was violative of the Act. Therefore, we reject the Administrative Law Judge's conclusion that the campaign in its entirety violated Section 8(a)(1).

2. The Administrative Law Judge found that the Hospital violated Section 8(a)(1) of the Act by maintaining invalid rules prohibiting employee solicitations and distributions. The Hospital excepts to this finding, contending that the Administrative Law Judge was precluded from finding this violation because of a prior settlement agreement, entered into by the Hospital in another case, which remedied this violation. We find merit in this exception.[5]

The Regional Director for Region 30, in October 1980, issued the instant complaint against the Hospital, alleging, *inter alia*, that the Hospital main-

[1] The Charging Party has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] In agreeing with the Administrative Law Judge that the Hospital's granting of a wage increase on October 11 was violative of Sec. 8(a)(1) of the Act, we also rely on the fact that employees were given a raise of 10 percent whereas in past years employees had only received raises of 6 or 7 percent. Where, as here, an employer does not present adequate business justification for its larger than normal wage increases, we have found such action to be evidence of a violation. See *San Lorenzo Lumber Company*, 238 NLRB 1421, 1422 (1978).

In agreeing with the Administrative Law Judge that the Hospital violated Sec. 8(a)(3) of the Act by refusing to pay registration fees and grant time off to employees Maureen Szymanski and Lois Mecklenberg to attend a seminar, we rely on the fact that the Hospital's refusal was admittedly motivated by the fact that the seminar was sponsored by a union. Even though the Hospital had allowed employees to attend union-sponsored seminars in past years when there was no union activity among its employees, it refused to allow employees to attend such seminars when its employees were actively involved in union activities. Thus, regardless of whether the employees who applied to attend the seminar were prounion or antiunion, the Hospital's motivation was the same, i.e., to take away a benefit because of its employees' exercise of their Sec. 7 rights, and accordingly it violated Sec. 8(a)(3) of the Act by this conduct.

[3] In affirming violations of the Act found by the Administrative Law Judge, we do not rely on, and expressly disavow, the Administrative Law Judge's characterization of the antiunion campaign of the Hospital as similar to that waged against prisoners of war.

[4] The Administrative Law Judge inadvertently set forth an incorrect description of the bargaining unit involved in this case. The correct unit description, which appears in the Regional Director's Decision and Direction of Election, is as follows:

> All full-time and regular part-time registered nurses employed by the Employer including graduate nurses, infection control coordinator, utilization review coordinator, home care coordinator, diabetes center nurses, certified registered nurse anesthetists and staff development coordinators, excluding guards and supervisors as defined in the Act, and all other employees.

We shall modify the Administrative Law Judge's recommended Order and notice to reflect the correct unit description. We shall also conform the Administrative Law Judge's Order and notice to the violations found.

[5] The Administrative Law Judge did not discuss the settlement agreement or its effect.

tained unlawful no-solicitation, no-distribution rules "at all times material herein." However, prior to issuance of this complaint, the Regional Director, on April 30, 1980, approved an informal settlement agreement signed by the Hospital in Case 30-CA-5367. As part of that agreement the Hospital posted a notice to employees which provided, in pertinent part:

> WE WILL NOT promulgate, maintain, or enforce any rule or regulation which prohibits our employees from soliciting on behalf of any labor organization on our premises, other than immediate patient care areas, during employees nonworking time.

Although the Charging Party and the bargaining unit in Case 30-CA-5367 were different from those involved in the instant case, it is undisputed that the complaint in that case covered the same time period as the instant complaint, that the Hospital posted the notice in that case for the prescribed period of time, and that the Regional Director has never set aside the settlement agreement in that case. Under these circumstances, we find that Respondent has fully remedied the violation regarding its invalid no-solicitation, no-distribution rules,[6] and that it would not effectuate the policies of the Act to find a violation in this regard. Accordingly, we hereby dismiss this allegation of the complaint.[7]

3. Because of the Hospital's conduct of its antiunion campaign in "violation" of no-solicitation, no-distribution rules, the Administrative Law Judge found that an "imbalance" was created and ordered the Hospital to grant equal access to its employees to the Union with no requirement that the Union reimburse the Hospital for employees' lost worktime. The Hospital excepts to this remedy as unwarranted in this case. We agree with the Hospital.

The Board has imposed an "equal access" remedy only in extraordinary cases where conventional remedies are not sufficient to fully rectify the violations found. See, e.g., *J. P. Stevens & Company, Inc.*, 240 NLRB 33 (1979). In view of our agreement with the Administrative Law Judge, discussed *infra*, that a bargaining order is appropriate to remedy the unfair labor practices committed by the Hospital, we find that this other extraordinary remedy is not warranted to remedy the unfair labor practices found herein. See *Dutch Boy, Inc., Glow-Lite Division*, 262 NLRB 4, fn. 14 (1982).

Moreover, in our opinion, the Administrative Law Judge's imposition of an equal access remedy was based on a faulty premise. First, no-solicitation, no-distribution rules are not binding upon employers. *N.L.R.B.* v. *United Steelworkers of America, CIO [Nutone, Incorporated]*, 357 U.S. 357, 362 (1958). As the Supreme Court expressly stated in that case an employer's right to engage in noncoercive, antiunion solicitation is "protected by the . . . 'employer free speech' provision of §8(c) of the Act," and nothing in law nor logic limits this right of an employer to discussions with employees only in nonwork areas on the employees' breaktimes.[8]

Moreover, a no-solicitation, no-distribution rule may lawfully be used to limit the access of nonemployee organizers to employees as long as it is applied in a nondiscriminatory manner and the union has other reasonable means of communication with employees. *N.L.R.B.* v. *Babcock & Wilcox Company*, 351 U.S. 105 (1956). Thus, an employer may lawfully campaign against a union during employees' nonbreaktime and in working areas even though neither employees nor nonemployee organizers may do so. In such a case, an employer has not unlawfully enforced its no-solicitation, no-distribution rule in a disparate manner nor unlawfully "violated" its rule. Accordingly, under these circumstances, and where, as here, there was no evidence adduced to show that the Union did not have reasonable access to employees, or that the Hospital unlawfully enforced its rules to limit access to its employees by nonemployee organizers or to curtail the activities of prounion employees while encouraging the activities of antiunion employees, we see no justification for imposition of an equal access remedy. We shall therefore not adopt this portion of the Administrative Law Judge's recommended Order.

4. The Administrative Law Judge found that the Hospital violated Section 8(a)(1) of the Act by supervisory interrogations of and threats to employees. Except as set forth below, we agree with these violation findings of the Administrative Law Judge.

[6] We attach no significance to the fact that the notice was posted pursuant to a charge involving a different union and different employees from those in the instant case. The notice is a notice to all employees, and there is no reason to assume that the employees involved in the instant case did not read or have the opportunity to read the notice, which clearly stated that the invalid rule would not be maintained.

[7] To avoid any misunderstanding, we emphasize that, in the absence of the settlement agreement, we would find, for the reasons stated by the Administrative Law Judge, that these rules were violative of Sec. 8(a)(1) of the Act.

[8] We, therefore, unlike the Administrative Law Judge, do not attach any significance to the fact that the Hospital utilized its supervisors as an integral part of its antiunion campaign and encouraged frequent contacts between the supervisors and the employees, both of which had the effect that the supervisors were away from their desks more than was customary. It is unclear from the Administrative Law Judge's Decision whether he found such conduct to be in itself violative of Sec. 8(a)(1) even though not alleged as such by the General Counsel. In any event we do not find such conduct violative of the Act for the reasons indicated above.

At an employee meeting on October 15, 1979,[9] Administrator David Rose stated, according to an employee:

> He discussed many things such as salary, that we can't count on having a better salary. We cannot count on having better benefits, anything like this would take anywhere up to several years, and that we shouldn't even be fooled by the fact that the Union can help us.

Contrary to the Administrative Law Judge, we find Rose's statement to constitute permissible electioneering. The thrust of Rose's statement was that unionization would not necessarily lead to higher wages or benefits, and, although Rose implied that bargaining would take "anywhere up to several years," he did not also imply that the Hospital would engage in bad-faith bargaining. Under these circumstances, we do not view Rose's statement as amounting to an implied threat of reprisal if the Union won the election. See *Oxford Pickles, Division of John E. Cain Co.*, 190 NLRB 109 (1971). Accordingly, we dismiss this allegation of the complaint.

Similarly, we find no threat of reprisal in the conversation between Supervisor Karen Keys and employee Patricia Plakut on October 19. Throughout that day Keys told Plakut that she wanted to talk to her for about 5 minutes. Each time Plakut answered that she was too busy to talk at that time. Later Keys sat down at a table opposite Plakut and, when Plakut again stated that she was too busy to talk, Keys got up and said, "Okay just wait until you want to talk to me about something," and left. In the absence of any evidence linking this threat to any possible job action that Keys might take against Plakut, we find the statement, standing alone, to be too nebulous to constitute an unlawful threat of reprisal.[10]

On October 19, Sister Pacis, director of surgery, gathered five or six employees into the staff lounge and asked various employees to read aloud various portions of a campaign letter from the Hospital. One of the employees present, Nancy Brandt, refused to read the letter aloud, stating that she was capable of reading it on her own free time and that she was busy and had work to do. Pacis gave her an "angry look" and called on another employee. Brandt stayed in the room for the 15 minutes of the meeting. In the absence of any evidence that Pacis disciplined, attempted to discipline, or threatened or coerced Brandt in any way for refusing to read aloud, we do not find Pacis' conduct to be violative of Section 8(a)(1) of the Act.[11]

Similarly, we do not find Supervisor Mardell Kuluzny's remark to Geanine Zakrzewski on September 20 about taking the time to become an informed voter, at a time when Zakrzewski was ministering to a bereaved family, to be unlawful since Kuluzny's remarks contained nothing which could be construed as coercive.

5. The Administrative Law Judge recommended a bargaining order to remedy the Hospital's unfair labor practices. The Hospital excepts to this remedy, contending that its unfair labor practices did not interfere with employee free choice in the election held on October 26 nor would such unlawful conduct preclude the possibility of a fair rerun election. For the following reasons, we find, notwithstanding our reversal of certain of the Administrative Law Judge's unfair labor practice findings, that a bargaining order is appropriate to remedy the unfair labor practices committed by the Hospital.

From the very day that the Union filed its election petition with the Board's Regional Office, the Hospital embarked on a course of retaliatory unfair labor practices. The Hospital sought to eliminate any employee support for the Union by interrogating employees about their union activities; by threatening employees with changes in working conditions, loss of previously obtained benefits, and loss of access to management if the Union won the election; and by promising benefits to the employees if the Union lost the election. This unlawful activity was committed by at least eight different supervisors and involved numerous employees. In addition, in the weeks preceding the election the Hospital accelerated its unlawful campaign. Thus, on October 11, Hospital Administrator David Rose held a meeting with a group of employees and in response to an employee question about Modern Management,[12] coupled with the statement that the employees felt "really under duress," Rose stated, "If the Union wins, 2M stays. If the Union doesn't win, 2M goes." Under these circumstances, Rose's statement constituted a threat to the employees that, in the event of a union victory, management would continue to keep them "under duress." Moreover, that same day Rose announced an across-the-board wage increase effective November 4 of 10 percent for all employees—3 to 4 percent higher than wage increases in the past, a merit wage increase up to 7-1/2 percent by Janu-

[9] All dates are in 1979 unless otherwise noted.

[10] For the same reason, Member Zimmerman would also not find violative of the Act Supervisor Rose Reitz' statement to employee Susan Ellis on October 25 that Ellis "had better" allow Reitz some time to discuss "the Union" with her.

[11] Member Jenkins would affirm the Administrative Law Judge on this incident.

[12] Modern Management, also called 2M, was hired by the Hospital to conduct its antiunion campaign.

ary 1, 1980, and a cost-of-living review by July 1, 1980. In addition, lest employees fail to see the connection between these wage increases and the union campaign, Supervisor Nancy Sykora stated to employee Francine Hanson on October 15, "What is it you girls are really unhappy about? You have your 10 percent raise. What else could you possibly want?"

It is, therefore, apparent that Respondent St. Francis Hospital reacted swiftly to the union organizing activity by embarking upon a course of unlawful conduct designed and calculated to erode union support. In addition to the numerous interrogations, threats, and promises of benefits, the Hospital granted an unlawful wage increase to all unit employees. This wage increase clearly demonstrated to the employees that they did not need a union to receive such a benefit. Thus, the employees could reasonably believe that they had achieved a large measure of what they were seeking through union representation. *Tower Enterprises, Inc., d/b/a Tower Records*, 182 NLRB 382, 387 (1970). Further, in light of the numerous unlawful promises of benefits, and especially that of Supervisor Sykora described above, it is unlikely that the employees missed the inference that "the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Thus, in agreement with the Administrative Law Judge, we find that the Hospital's unfair labor practices are serious and pervasive in their impact—the unlawful wage increase in particular having touched all unit employees. Such conduct can reasonably be expected to have a lingering effect on employees, by signaling to them the Hospital's displeasure at union activity and the lengths to which it would go to stifle the employees' right to self-organization. *C & G Electric, Inc.*, 180 NLRB 427 (1969); *National Care & Convalescent Industries, Inc. d/b/a Elmwood Nursing Home*, 238 NLRB 346 (1978). In addition, even after it won the election, the Hospital unlawfully refused, contrary to past practice, to allow two employees to attend a union-sponsored seminar. Such conduct emphasized to employees that the Hospital would continue to punish them for their union activities even after the election, and thus served to remind them, lest they forgot, that their support for the Union, or activities on its behalf, would not be tolerated. For all these reasons, we find that simply requiring the Hospital to refrain from repeating such conduct, the traditional remedy, will not erase the effects of this unlawful conduct, and will not enable the employees to participate in a free and uncoerced rerun election. Therefore, we find, as did the Administrative Law Judge, that a bargaining order, rather than another election would best protect employee sentiment as indicated by the authorization cards.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, St. Francis Hospital, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs 1(a), (b), and (c); reletter paragraph 1(d) as paragraph 1(a); and insert the following as paragraphs 1(b), (c), (d), (e), and (f):

"(b) Announcing or granting general wage increases, COLA increases, or merit wage programs, in order to discourage employees' membership in or other activity on behalf of the Union.

"(c) Interrogating employees concerning their own or other employees' union membership activities and desires.

"(d) Promising employees benefits in order to discourage their interest in or activity on behalf of the Union.

"(e) Threatening employees with reprisals if they do not refrain from becoming or remaining members of the Union or giving any assistance or support to it.

"(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Delete paragraph 2(b) and reletter the remaining paragraphs accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint in Case 30-CA-5698 be, and it hereby is, dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT announce or grant general wage increases, COLA increases, or merit wage programs, in order to discourage our employees' membership in or other activity on behalf of the Union.

WE WILL NOT interrogate our employees concerning their own or other employees' union membership activities and desires.

WE WILL NOT promise our employees economic benefits for the purpose of discouraging their interest in or activity on behalf of the Union.

WE WILL NOT threaten our employees with reprisals if they do not refrain from becoming or remaining members of the Union or giving any assistance or support to it.

WE WILL NOT deny our employees compensation and fees to attend training classes because they engage in union activities or protected concerted activities.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, and other terms and conditions of employment with St. Francis Federation of Nurses and Health Professionals, affiliated with the Wisconsin Federation of Nurses and Health Professionals, affiliated with the American Federation of Teachers, AFL–CIO, as the exclusive bargaining representative of our employees in the following appropriate bargaining unit:

> All full-time and regular part-time registered nurses employed by us including graduate nurses, infection control coordinator, utilization review coordinator, home care coordinator, diabetes center nurses, certified registered nurse anesthetists and staff development coordinators, excluding guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, recognize and bargain collectively and in good faith concerning rates of pay, wages, and other terms and conditions of employment with St. Francis Federation of Nurses and Health Professionals, affiliated with the Wisconsin Federation of Nurses and Health Professionals, affiliated with the American Federation of Teachers, AFL–CIO, as the exclusive bargaining representative of the employees in the appropriate bargaining unit described above and, if an understanding is reached, embody such understanding in a signed agreement.

ST. FRANCIS HOSPITAL

DECISION

STATEMENT OF THE CASE

GEORGE NORMAN, Administrative Law Judge: This proceeding was heard before me at Milwaukee, Wisconsin, between April 20 and 23, 1981. The original charge was filed on January 15, 1980, by the St. Francis Federation of Nurses and Health Professionals, affiliated with the Wisconsin Federation of Nurses and Health Professionals, affiliated with the American Federation of Teachers, AFL–CIO, herein called the Union. Amended charges were filed on January 22, March 5 and 21, and October 2 and 27, 1980, in Case 30–CA–5607, against St. Francis Hospital, herein called Respondent St. Francis. A complaint and notice of hearing was issued by the Regional Director for Region 30 on October 30, 1980. On November 19, 1980, an amendment to that complaint was issued.

On March 5, 1980, in Case 30–CA–5698, the Union filed a charge against Modern Management Methods, Inc.[1] A complaint based on that charge was issued on February 20, 1981.

The complaint and amendment to complaint in Case 30–CA–5607 alleges that Respondent St. Francis violated Section 8(a)(1) and (3) of the Act. The complaint in Case 30–CA–5698 alleges that Respondent 2M violated Section 8(a)(1) of the Act.[2]

A. *The Issues in the Complaint Against Respondent St. Francis*

1. Did Respondent St. Francis violate Section 8(a)(1) of the Act by: announcing a wage increase; promising a merit increase; systematically interrogating employees concerning their union activities and sympathies; promising better benefits and improved working conditions to employees; threatening employees; maintaining and disparately enforcing illegal and overbroad no-solicitation, no-distribution rules; and denying the Union equal time and access to the employees?

2. Has Respondent St. Francis violated Section 8(a)(3) of the Act by refusing to pay registration fees and grant time off to Maureen Szymanski and Lois Mecklenburg to attend an accredited training course?

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[1] At the hearing, all formal papers were amended to change the name to Modern Management, Inc., which will hereafter be referred to as Respondent 2M.

[2] On August 23, 1979, the Union filed a petition for an election in Case 30–RC–3611. After a hearing, the Regional Director, on September 28, issued a Decision and Direction of Election. The election was held on October 26. The tally shows that, of approximately 206 eligible voters, 95 cast votes for and 100 against the Union; there were 3 challenged ballots which were not sufficient to affect the results of the election. On November 1, the Union filed timely objections to conduct affecting the results of the election. After a hearing, the Report on Objections issued on February 1, 1980, and, on July 11, 1980, the Board affirmed the report of the hearing officer and issued a Decision and Direction of Second Election.

3. Does the above conduct prevent the holding of a fair rerun election, thus necessitating a *Gissel* order requiring Respondent St. Francis to recognize and bargain with the Union without holding a second election?

B. *The Issues Involving Respondent 2M*

1. Was Respondent 2M responsible for and in control of the campaign, on behalf of Respondent St. Francis, against the Union's organizational effort?

2. Was Respondent 2M the principal and/or manager of that campaign; or, alternatively, were Respondents St. Francis and 2M co-principals and/or co-managers of that campaign?

3. Were the named supervisors of Respondent St. Francis also the supervisors and/or agents of Respondent 2M?

4. Was Respondent 2M in violation of Section 8(a)(1) of the Act by the conduct of the named supervisors, including interrogation concerning the employees' union activities and sympathies, promising benefits and improved working conditions, and making threats to employees?

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT ST. FRANCIS

Respondent St. Francis is a Wisconsin corporation which has maintained and operated a hospital in Milwaukee, Wisconsin. During the past calendar year in the course and conduct of its operations, Respondent St. Francis derived gross revenues in excess of $250,000 and purchased and received goods and products valued in excess of $5,000 at its Milwaukee hospital directly from points outside the State of Wisconsin. Respondent St. Francis has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is, and has been, a health care institution within the meaning of Section 2(14) of the Act.

II. THE BUSINESS OF RESPONDENT 2M

Respondent 2M is an Illinois corporation, with its home office and principal place of business located in Bannockburn, Illinois. It is engaged in the business of representing employers, including St. Francis Hospital (Milwaukee), concerning labor relations and other matters. Between the months of August and October 1979, Respondent 2M maintained an office at St. Francis Hospital (Milwaukee). During the calendar year ending December 31, 1980, Respondent 2M, in the course and conduct of its business operations described above, supplied services valued in excess of $50,000 to clients or business enterprises located outside the State of Illinois, which clients or business enterprises meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. Respondent Modern Management is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

III. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES[3]

I have reviewed the evidence of record and the Hearing Officer's Report on Objections with findings and recommendations in Case 30–RC–3611 and the Board's Decision and Direction of Second Election in that case. Although I do not consider myself bound by those findings and conclusions, as adopted by the Board, I adopt the Hearing Officer's findings of fact. I will not repeat them except as necessary in the discussion of the alleged unfair labor practices which are the subject of this litigation.

The Organizational Campaign

In about June 19, 1979,[4] the Union started an organizational campaign among the registered nurses employed by Respondent St. Francis and, on August 17, the Union was designated (by membership card signing) as the exclusive bargaining representative by a majority of the registered nurses (RNs) in an appropriate unit.

On August 23, the Union filed a petition for an election in Case 30–RC–3611. An election was conducted on October 26 pursuant to a Decision and Direction of Election issued by the Regional Director for Region 30, National Labor Relations Board, on September 28 in the following described unit:

> All registered nurses employed by the employer, including assistant head nurses, in-service instructor, utilization review coordinators, discharge planner,

[3] The parties stipulated as to the exhibits and certain pages from the transcript of the objections to the election hearing, referred to above, into the record to avoid duplication of testimony. The parties reached an understanding that the witnesses would give the same testimony if called to testify in the instant proceeding.

The General Counsel offered the Hearing Officer's Report on Objections in Case 30–RC–3611. The court reporter included that document, although rejected, with the General Counsel's exhibits received into evidence. The General Counsel contends that the Administrative Law Judge is bound by the Hearing Officer's findings of fact and credibility, as affirmed by the Board. The General Counsel contends further that the Hearing Officer's Report on Objections was rejected originally in order that Respondents could call witnesses to refute the testimony contained in the objections hearing transcript and, inasmuch as neither Respondent presented any evidence although both had the opportunity to do so, that testimony is not modified by any testimony in the instant case and the Board has already ruled on the facts and credibility issues arising out of that testimony. Therefore, he argues, the Administrative Law Judge may not reverse any findings of fact or credibility determinations made by the Board; and that he should determine whether Respondents' conduct, based on those findings of fact and credibility, violated Sec. 8(a)(1) as alleged in each complaint. In support of his contention, the General Counsel cites *Mosher Steel Company* v. *N.L.R.B.*, 568 F.2d 436 (5th Cir. 1978), and *Wayne County Neighborhood Legal Services, Inc.*, 249 NLRB 1260, 1262 (1980).

I do not consider the Board's factual findings in a related representation case to be binding upon me in a subsequent unfair labor practice proceeding because the issues are different in the two types of proceedings. *Helena Laboratories Corporation*, 225 NLRB 257 (1976), wherein it cited, in fn. 6, *McEwen Manufacturing Company*, 172 NLRB 990, fn. 6 (1968), enfd. 419 F.2d 1207 (D.C. Cir. 1969), cert. denied 397 U.S. 988 (1970). Accord: *Thomas Products Co., Division of Thomas Industries, Inc.*, 175 NLRB 776 (1969), enfd. 432 F.2d 1217 (6th Cir. 1970).

[4] All events herein took place in 1979 unless otherwise indicated.

> infection control nurse and patient teachers, but excluding office clerical employees, technical employees, in-service coordinator, head nurses, quality care coordinator, guards and supervisors as defined in the Act.

The tally of ballots shows that, of approximately 260 eligible voters, 95 cast ballots for and 100 cast ballots against the Union. Challenged ballots were nondeterminative of the results of the election.

On November 1, 1979, the Union filed objections to the election based on certain aspects of Respondent's conduct. A hearing on these objections was conducted in November and December. On February 1, 1980, the Hearing Officer concluded in his Report on Objections with Findings and Recommendations that Respondent St. Francis had interfered with the election and recommended that the election results be nullified and a rerun election be conducted. After consideration of the Hearing Officer's recommendation, the Board, in a Decision and Order issued July 11, 1980, adopted the report, set the election aside, and directed a second election.

The Alleged 8(a)(1) Conduct (Promise of Benefits)

The complaint against Respondent St. Francis alleges that on or about October 12, about 2 weeks before the election, David Rose, St. Francis Hospital administrator, announced that a 10-percent wage increase would be implemented on or about November 4 (after the election); promised that a merit increase program up to 7-1/2 percent would be implemented by January 1, 1980; and further promised a cost-of-living review to be conducted on or about July 1, 1980.

The unrebutted testimony reveals that, by letter dated January 16, Respondent St. Francis wrote to its employees that they would get a 7-percent raise but that no merit increases would be granted in 1979. However, on October 11, shortly after he became administrator, David Rose announced, at a mass meeting, that the employees should be given a raise. On the next day he issued a letter announcing a 10-percent raise for all employees effective November 4, a merit increase of up to 7-1/2 percent effective January 1, 1980; and a review of economic conditions in July 1980. Rose's October 12 letter was issued 14 days before the election.

Up until January (1979), Respondent St. Francis had granted pay raises twice a year. The first raise of the year was usually given in January or February and normally was 6 to 7 percent. Merit increases were also given once a year to employees on their anniversary date of employment with the hospital. Then came Respondent St. Francis' letter dated January 16 referred to above. That letter caused much employee dissatisfaction.

Administrator David Rose, who was appointed by Respondent St. Francis to the job of administrator on September 19, was a senior vice president of American Health Care Management, Inc. He testified that when he arrived at St. Francis Hospital he discovered that the hospital had been under considerable difficulty with communicating with its employees, its personnel policies, and the pay scale. Rose also referred to the fact that when he arrived a petition for an election had been filed. In sum, David Rose's testimony was that Respondent St. Francis took the actions described above for valid business reasons because other hospitals had increased wages, and there was a shortage of nurses resulting in the closing of two units.

The Alleged Interrogation of Employees Concerning Their Union Activities

The complaint alleges several instances of interrogation of employees concerning their union activities. The evidence reveals that admitted supervisors on numerous occasions asked staff nurses why the employees wanted the Union, how they felt about the Union, or asked questions concerning the employees' protected concerted activities.

Respondent St. Francis contends that the interrogation in question did not interfere with or coerce the employees with respect to the free exercise of their rights under the Act in that there is no evidence that the staff nurses felt threatened or feared reprisal from the hospital as the result of the discussion that occurred. Respondent St. Francis further contends that, absent that evidence, the hospital supervisors did not violate Section 8(a)(1) of the Act.

The complaint alleges that, on August 23, Supervisor Irene Myer interrogated a staff nurse. The record reveals that Myer had conversations with two staff nurses on that date, Debra Haddix and John Ackerman. Ackerman testified as follows:

> She [Myer] wanted to know what my feelings were. I told her I was pro-union and she stated, "—well, why not give the hospital a chance? There's going to be a new administrator." She told me I was a great guy. She said she would be disappointed if I voted no, and I said, "Save your time. You're wasting your breath."

Debra Haddix testified that she had a conversation with Irene Myer on that day in which Myer asked her what her opinion was of the Union. Haddix also testified that Myer then asked Haddix what advice Haddix might give her as a member of management, and Haddix stated that she should just "stay out of it" and Haddix then got up and left.

The complaint further alleges that on September 3, 1979, Supervisor Mardell Kuluzny interrogated a staff nurse. The staff nurse, Joan Wolf, testified that Kuluzny asked her what her feelings were about the Union and why she wanted the Union. Wolf responded, at length, telling her what her feelings were about the Union; that the nurses needed to be unified because they were losing power and, as a result, patient care was on the decline; and that if nurses would get their words into action they might be able to improve. Supervisor Kuluzny responded by asking Wolf if she "honestly" believed that a union can do the things that she was "looking for it to do." That meeting between Kuluzny and Wolf was precipitated by an earlier encounter in which Kuluzny stared at the union button then being worn by Wolf. Wolf told her that she was wearing the union button because she supported the principles of the Union. Without saying a

word, Kuluzny turned on her heel and walked away from Wolf. Shortly thereafter, Kuluzny called Wolf on the telephone and told her that, before she lost all "professional respect" for Wolf, she wanted to talk to her. The meeting previously discussed between Kuluzny and Wolf was the result of that request.

The complaint alleges that, on September 7, Rose Reitz interrogated a staff nurse. Staff nurse Irene Dawyduik testified that, on September 7, Supervisor Reitz asked her how she "felt about all the commotion, the Union—anti-union things going on in the hospital." Dawyduik responded that she was busy and would prefer not to discuss it. Reitz continued by stating that they did not need a third party. And that "if you just give us 1 year we would take care of it. Give us 1 year." She repeated that several times. Reitz testified, at the hearing on objections, that she was not directed to ascertain nurses' union sympathies, that she was exhorted "not to inquire about nurses' individual feelings regarding the Union and that she did not and would not, ask individual nurses whether they were pro or anti-union."

The complaint alleges that on October 12, 1979, a supervisor interrogated a staff nurse. Staff nurse Betty Wilcox testified that on the day before the election Supervisor Helen Gerow telephoned her at home and told her that she, Gerow, was calling with regard to a letter that the hospital had received that day, that she knew she would not see Wilcox before the next evening and she wanted to call Wilcox because she was concerned. Gerow said that the letter "said something to the effect . . . that we the undersigned are in favor of the Union, and that my signature was among the signatures listed, and she wanted to be sure my name had not been used illegally." Gerow then asked Wilcox if she had signed the letter, and Wilcox responded in the affirmative and told Gerow that that was not what the letter said. Gerow then asked her what the letter said. Wilcox told her that it was concerning the "3M Company" and how much they were being paid by St. Francis Hospital.

Promises of Benefits and Improved Working Conditions

In the incidents alleged in the complaint, supervisors and other management personnel repeatedly promised staff nurses improved benefits and conditions of employment in order to dissuade them from supporting the Union. The evidence reveals that rather than making specific promises of benefits and improved working conditions the supervisors stated to the staff nurses that grievances would be resolved without a third party (the Union) if they gave the new management headed by David Rose a chance. In a conversation between Supervisor Nancy Sykora and Francine Hanson which occurred on October 15, Hanson testified that Sykora said, "What is it you girls are really unhappy about? You have your 10 percent raise. What else could you possibly want?" Hanson replied by stating other things they were considering, including such benefits as weekend differential rate for seniority, job security, and job descriptions in the contract.

Respondent St. Francis contends that the statement, "Give the new hospital management a year," was protected speech under Section 8(c) of the Act.[5]

Alleged Threats of Reprisals Against Employees' Continued Support of the Union

The complaint alleges that, on several occasions, supervisors made threats of reprisals against the employees for their continued support of the Union. Staff nurse Maureen Szymanski testified that, on or about August 17, Supervisor Helen Gerow told her that at one of the previous coordinating counsel meetings the subject of pre-op teachers was brought up by Supervisor Mardell Kuluzny who made the statement that she felt that more pre-op teachers should be trained because two of the teachers (Szymanski and Karen Emmerson) were inadequate to teach patients pre-op because of their "Union involvement."[6]

Barbara Janusiac testified that, on September 6, Supervisor Karen Keys told a staff nurse after that staff nurse stated, "I need to make a call before lunch," that she would not be able to do this once "you have a union."

Maureen Szymanski further testified that, on September 11, Supervisor Renata Alonte said to her, "Maureen, you know I do not like the idea of union." Szymanski said, "Why do you feel that way?" Alonte replied, "Well, for one thing, if the Union were to get in, the employees would no longer be able to come to me with their problems. They would go to a union steward."

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[5] American Health Care Management, Inc., headed by Administrator David Rose, assumed management responsibility of the hospital on September 19, almost 1 month after the petition for an election had been filed. The new administration's request that it be "given a year" was tantamount to a request that it be given time to prove itself before staff nurses chose to be represented by the Union. Respondent St. Francis contends that the General Counsel's argument that the new administration request that it be "given a year" constituted an implied promise of benefits assumed far too much. It argues that under the circumstances of American Health Care Management's arrival at the hospital the General Counsel's view would mean that almost any election statement would constitute an implied promise of benefit. If one accepts the General Counsel's view, election statements as innocuous as "Unions are not in the best interest of nurses" or "Unions are unnecessary" would constitute implied promises that working conditions at the hospital would be improved by rejecting the Union.

However, the General Counsel argues that Sykora's statement to nurse Hanson on October 15 about the pay raise was meant to show that management had already started its campaign to improve wages and working conditions. The General Counsel further argues that the timing, content, and frequency of such statements belie their innocence and ambiguity and that, on its face, the statement says that, if management fails to give the employees everything they want within 1 year, the nurses can again seek union representation. In the hope that nurses would believe this promise, management repeated it during the entire 2 months prior to the election, including Rose's speech to the nurses 2 days before the election. Although the promised benefits are not specifically stated, the message was obvious (especially after the October 12 wage increase and other promises) that management would improve conditions if the nurses rejected the Union. The General Counsel cites *Royal Petroleum Corporation*, 243 NLRB 508 (1979), and *Hubbard Regional Hospital*, 232 NLRB 858 (1977). The statement in question made in the context described above takes it out of the protection of Sec. 8(c) of the Act. In agreement with the General Counsel, I find it to be an independent violation of Sec. 8(a)(1) of the Act.

[6] Their duties included the teaching of pre-op classes in which patients are instructed, prior to surgery, as to what to expect before, during, and after surgery. The classes were held 5 nights a week, Sunday through Thursday.

Staff nurse Joan Wolf testified that, on October 11, Hospital Administrator David Rose called a meeting in the seventh floor auditorium of nurses, maintenance men, secretaries, and office workers. During the meeting Wolf asked Rose about Respondent 2M, stating that the nurses felt "really under duress." He told her, "If the Union wins, 2M stays. If the Union doesn't win, 2M goes."

Staff nurse Irene Dawyduik testified that, on October 15, David Rose, during the general meeting discussed above, stated to the employees as follows:

> He discussed money things such as salary, that we can't count on having a better salary. We cannot count on having better benefits, anything like this would take anywhere up to several years, and that we shouldn't even be fooled by the fact that the Union can help us.

Staff nurse Francine Hanson testified that, on October 15, Supervisor Nancy Sykora told her that the Union "is bringing things up all over the hospital, it's destroying us. You will not be allowed to speak to me if you have a problem or a grievance, you have to go through a union steward. This would destroy our relationship among us fellow nurses. You'll have to go through a union steward."

Staff nurse Patricia Plakut testified that, on October 19, Supervisor Karen Keys wanted to talk to her throughout the day.

> She kept telling me that she wanted to talk to me for about 5 minutes. I told her that I wasn't available at that time. I couldn't talk to her at that time. I was filling out a report sheet. I was doing some of my charting . . . . Karen sat down across the table . . . . And she just sat there and she was looking at me, and I looked over at her and I had just looked at her and she said, "just 5 minutes," and I said, "I can't right now," and she may have repeated it one more time, "just 5 minutes," and I said, "I can't, you know. I'm busy right now," and she got up and she said, "Okay just wait until you want to talk to me about something." and then she left the unit.

Nurse Plakut further testified that she had had short discussions with Supervisor Keys previously and, when Plakut was asked what the discussions were about, she said that she assumed that, in the morning, Supervisor Keys was called to a management meeting and in the afternoon she would usually come around, as would the other head nurses.

> They would come around in the afternoons and just take us away for about 5 minutes or so, they said, and would give us papers from the hospital.
>
> Q. What was the general subject of these things that they gave you?
>
> A. Like anti-union things.
>
> Q. Did this happen often?
>
> A. Yes it did.
>
> Q. As a result of these meetings were the supervisors away from their normal post more than was normally the case?
>
> A. Yes.

Nurse Plakut further testified that a supervisor was normally in the unit sitting at a desk during the shift. But during the union campaign they were away from their post attending management meetings almost every morning. She said that, during the absence of the head nurses, an RN on the unit would take over, including herself. She further testified, "It got to be that you knew that they were going to go to the meetings in the mornings and you knew that at some time during the day you were going to be approached and they would take you aside and you know, give you the same kind of talk—just, anti-union kind of things. We had a real good friendship and it really put a strain on that friendship." Plakut testified further that it made it difficult for her to function and to perform her duties as a nurse.

Nurse Nancy Miljour testified that, on October 24, Supervisor Mardell Kuluzny was standing at the desk in her unit when she went to the desk to do her 24-hour report. Kuluzny told Miljour that she wanted to speak to her.[7] Miljour told Kuluzny that she had a 24-hour report to fill out. Miljour asked if she could fill out the report during the conversation. Kuluzny told her that she could and proceeded to tell Miljour that she was very surprised at what she had seen on TV.[8] Miljour replied that she did not know why Kuluzny was surprised because Kuluzny knew that she was for the Union. Kuluzny had some papers in her hand and showed them to her. One was from the hospital and the other was from the Union. Miljour told her that she had not received either in the mail and then looked them over with Kuluzny. A discussion about the Union and economic strikers ensued.

As she was leaving, Kuluzny turned around and pointed her finger at Miljour and said, "You wanted a second chance at nursing didn't you?" Miljour testified that she was taken aback and responded, "Well, you know I did."[9] Miljour further testified that Kuluzny then said, "Just remember that we want our second chance and we want ours. Remember that when you vote."

Miljour testified that at the time there were other employees in the area, including nurses aides. She said she was embarrassed because she was afraid that they were going to think she lost her nurse's license and that the hospital gave her a second chance to be a nurse. Miljour said she was "absolutely mortified. I just wanted to crawl in a hole." Miljour further testified that she felt intimidated by what Kuluzny said, and humiliated because there were other people present.

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[7] Supervisor Kuluzny was an in-service director who trained new nurses concerning hospital procedures, forms, and policies. She also instructed the nurses as to their duties. She was not normally expected to be at a supervising station. Supervisors Gerow and Alonte were Miljour's supervisors at the time.

[8] Miljour appeared on the TV news program the night before and made comments concerning the Union.

[9] Miljour came to Respondent St. Francis from another hospital, where she had just started nursing. That hospital was pushing primary care and it was hard for Miljour to keep up with the pace. She gave her notice after 2 months and applied at St. Francis. She revealed to St. Francis the reason she left the other hospitals, that she could not handle the pace at that time. Miljour had told Kuluzny of this experience during the orientation.

Staff nurse Susan Ellis testified that, on October 25, Supervisor Rose Reitz came to her at or about 10 or 11 a.m. while she was charting and said that she would like to talk to Ellis after Ellis was done with her charting. Ellis asked what it was about. Reitz replied, "The Union." When Ellis told her she did not want to discuss it any further Reitz said, "you had better." Ellis then went to the back of the conference room and Reitz closed the door.[10] Ellis testified further that she got very sick of the subject and did not want to hear anything more about it. It upset her when she asked not to talk about it any further and the supervisors insisted that she did. Usually, she just let them say what they wanted to say. She said that the morale of the hospital was very low, that nurses could not trust the supervisors, and that one did not know to whom to turn in case a problem arose.

Respondent St. Francis' Antiunion Campaign Allegedly Independently Violated Section 8(a)(1) of the Act

The complaint alleges that Respondent St. Francis' antiunion campaign independently violated Section 8(a)(1) of the Act. In support of this allegation the General Counsel relies on the totality of the evidence in support of the alleged 8(a)(1) activity discussed above. The allegation is that Respondent St. Francis conducted a systematic antiunion campaign by interrogating the nurses almost daily concerning their union sympathies and activities. The General Counsel contends that Respondent St. Francis' campaign of frequent and intensive meetings on a one-to-one basis by the supervisors and other management persons with the nurses was in reality a manner of interrogation. In addition to the evidence submitted in support of the 8(a)(1) allegations previously discussed, the General Counsel relies on other incidents in which representatives of Respondent St. Francis met with registered nurses.

Examples of such one-on-one meetings follow: Nurse Susan Ellis had a conversation about the union campaign with Rose Reitz on September 10 and with Supervisor Jackie Solachek on September 29. Reitz asked other nurses to meet with her and speak with her privately on a regular basis. The record also reveals that Ellis had discussions with Solachek every time the hospital issued a letter concerning the Union campaign. Nurse Patricia Plakut was summoned to a private meeting with Reitz on September 26. She met with Supervisor Keys October 1, and had frequent meetings concerning the antiunion literature issued by Respondent St. Francis.

The evidence establishes a practice of supervisors attending management meetings in the morning and meeting with the nurses later in the day to distribute and discuss literature. On September 10, nurse Joan Wolf was asked, by Marilyn Fanecki, head of the intravenous therapy department, whether the nurses would need a union if the administrative problems were resolved. On September 20, Wolf was directed by Supervisor Solachek to read a letter from management after which Solachek asked Wolf if she had any questions. Wolf had other such contacts with supervisors. She testified that, on the Sunday before the election, Supervisor Kuluzny repeatedly asked nurse Zakrzewski to talk about the election.

Zakrzewski testified that on that day her unit was full to capacity and, of the 21 people in the unit, 4 were dying. They were being watched closely and it was a matter of who would die first. The nurses were extremely busy. Notwithstanding, Supervisor Kuluzny and Patty Beagle came to her unit frequently during the day and kept approaching staff nurse Geanine seeking to speak with her. Geanine kept telling them that she did not have time, that she was too busy. During that afternoon they approached her three times.

After one of the patients died, staff nurses were ministering to the bereaved family, whose members were standing near the nursing station. The nurses were trying to make arrangements for the funeral and the disposition of the clothes and valuables that the patient had brought in with him. In the midst of all this, Supervisor Kuluzny said to Geanine, "I hope you take the time to get the information to make an informed decision so that you can make a responsible vote" on election day. Wolf testified that the whole episode made her angry.

Staff nurse Irene Dawyduik testified that on September 6, Supervisor Solachek walked onto the floor and started talking about unions and her antiunion feelings. The other nurses walked away but Dawyduik remained. Solachek told her that "with the Union we would get nowhere. As a matter of fact, we might have less than we already have." She also testified that on September 7, at or about 8 p.m. Supervisor Reitz appeared and asked if she could talk to Dawyduik and asked her to step into the backroom (medication room) and to close the door. Dawyduik said, "She started just generally discussing how I felt about a third party being involved. She repeated herself over. This lasted about 20 minutes, and she was constantly talking about no third party was necessary. We could take care of what we needed with a new management team and since Sister Michelle was no longer employed there this should have taken care of our unhappy problems." She then asked, "Why we would really need another person. Why can't we sit together and discuss this as one family and friends and take care of it.When asked how many such meetings she had in the course of the union campaign, Dawyduik responded, "I know of 5 to 6 for sure. There might have been more. There's many confrontations on the floor as a supervisor would come around for report time."

On the day of the election Supervisor Solachek asked staff nurse Karen Werra if she voted for Solachek. Werra replied that she did not see her name or anybody else's name on the ballot. Supervisor Solachek replied that she was taking the election "personally."

Staff nurse Nancy Brandt testified that, on October 19, she was in the hallway next to Sister Pacis' office. Pacis emerged and announced she was holding a meeting right then. Brandt testified, "and she grabbed all the people that were in the vicinity and said, would you come into our lounge." Five or six staff nurses went into the lounge with Sister Pacis. Pacis had a legal-sized letter from Hos-

[10] At the time these remarks were made several nurses aides and one unit clerk were present.

pital Administrator David Rose and passed out a copy to each of those present, declaring "I will let you read for yourselves," and then she asked various people in the room to read various portions of the letter aloud to the group. Brandt said that she would not read the letter aloud, that she was capable of reading it on her own free time, and that she was busy and had work to do. Brandt said Pacis gave her an angry look and then called upon another person to finish reading the letter out loud. Brandt said the meeting took about 15 minutes of worktime. When asked if this occurred more than once, Brandt said that it happened repeatedly prior to that for about 2 weeks. Brandt testified further, "I had talked to some of my co-workers. When I found out that they were reading portions of letters out loud to groups, I said, 'Are you really reading them out loud?' And both of the girls that I talked to said, 'Yes.' And I said, 'Why? You don't have to do that.' And they said, 'Well, we realize it's like a child's game but we're afraid not to. So we're going to go along with the game.'"

The record is replete with incidents such as those described above. Staff nurses Janusiac, Susan Jones, and others testified that it was almost a daily occurrence for nurses to be approached by a supervisor to discuss antiunion literature.

In agreement with the General Counsel I find the foregoing evidence establishes that Respondent St. Francis engaged in an intensive, high-pressured, systematic antiunion campaign in violation of the nurses' Section 7 rights.

Hospital Administrator David Rose admitted that management had inconvenienced the staff nurses. He said he apologized to them for any inconvenience or any stress that the campaign brought about "within our activities telling the management's side of our story." Supervisor Rose Reitz admitted that supervisors, including herself, did have meetings with and distributed letters to the nurses.

The General Gounsel contends that Respondent St. Francis' antiunion campaign did more than "tell the story." It amounted to a solicitation of employee views and thus constituted illegal interrogation. The campaign is an example of how frequent threats, promises, personal attacks, and appeals, all in an environment of stress, can provide an atmosphere which is the same as or worse than direct interrogation, without using the usual words found to be unlawful. By the nature of its forcefulness, pressure, and frequency, the campaign was designed to force the nurses to verbalize their feelings about the Union to the supervisors. The supervisor did more than state the hospital's position. "They used every trick that a professional interrogator used against a prisoner of war. They created stress, pulled rank, cajoled, threatened, promised, personalized the issue and otherwise attempted to brain-wash the nurses."

I agree with the General Counsel that the tactics used by Respondent St. Francis went well beyond free speech permitted by Section 8(c) of the Act. I find that Respondent St. Francis' antiunion campaign independently violated Section 8(a)(1) of the Act as alleged in the complaint.

The Alleged Illegal No-solicitation/No-distribution Rules

Rules 52 and 56 contained in Respondent St. Francis' employee handbook dated January 1, 1976, and in effect during times material herein provide:

> 52. SOLICITATIONS ON YOUR OWN TIME, PLEASE
>
> You should not be subjected to buying candy, cleaning products, housewares, and like items while at work.
>
> You should not be asked or forced to sign petitions, membership cards, or similar items just because you are employed at St. Francis Hospital.
>
> Therefore, employees who wish to engage in such non-hospital business and/or charity functions are asked to do so outside of the hospital property.
>
> Work time is designed for productive patient care. To assure employees that their right to avoid sales and requests will be upheld and to guarantee that patients aren't paying for such through their room rate charge, the following will be enforced.
>
> *Non-hospital business must be conducted outside of the work station and on your own time* (breaks and lunch periods for instance). This will also apply to the interference of other employees during your free time while they are engaged in work activities. [Emphasis supplied.]
>
> Any employee who engages in non-hospital business on hospital time in the work area will be subject to discipline, including a three-day suspension without pay or discharge for flagrant violations.
>
> Any employee who engages in any activity which causes disruptions to another employee's work security, or the stability and operation of the hospital and/or who threatens any other employee directly or indirectly will be subject to immediate discharge.
>
> * * * * *
>
> 56. YOU ARE SECURE IN YOUR JOB. WE'RE NOT IN BUSINESS TO FIRE PEOPLE
>
> It costs many dollars to hire, orient and train employees. We are selective in whom we hire because we want long term employees. We hired you in hopes that you would stay with us and grow with us.
>
> You can be assured that your job holds a significant amount of security. Here's how we look at it. People of good sense prefer to live and work in an orderly way. Commonly accepted rules of conduct help maintain good relationships between people. They promote responsibility and self development. You avoid misunderstandings, frictions, and other problems by avoiding thoughtless or wrongful acts such as:
>
> Dishonesty.

Damage, loss or destruction of company, employee, patient or visitor property due to careless or willful acts.

Unauthorized removal or use of property belonging to the company, any other employee, any patient or any visitor.

Being under the influence of, or possessing or using alcohol or illegal drugs during work time (refer to the hospital's policy on Behavior/-Medical Problems.)

Loafing or sleeping on the job, inefficient performance of duties, incompetence, or neglect of duty.

Failure or willful refusal to perform work as directed, insubordination.

Negligence in observing fire prevention or safety regulations, or failure to report on-the-job injuries or unsafe conditions.

Excessive or unexcused absenteeism or tardiness.

Unwillingness or inability to work in harmony with others, discourtesy, or conduct creating disharmony, irritation or friction.

Fighting, gambling, horseplay, or using profane, obscene or abusive language while at work, threatening, intimidating or coercing others on company premises, or carrying unauthorized weapons.

Soliciting or selling on hospital time in the work place.

Falsification of records.

Failure to maintain confidentiality of hospital information.

Failure to maintain dignity of the patient.

Violation of hospital policies or any other commonly accepted reasonable rule of responsible personal conduct.

You are secure in your job. *However, violation of the above rules is just cause for disciplinary action up to and including discharge.* [Emphasis supplied.]

The General Counsel contends that inasmuch as Rule 52 allows employees to engage in solicitation and distribution only "outside the work station and on your own time" subject to discipline, suspension and/or discharge, as stated in Rule 56, that such rules are presumptively unlawful, citing *N.L.R.B.* v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979), and *Beth Israel Hospital* v. *N.L.R.B.*, 437 U.S. 483 (1978). Those cases hold that rules prohibiting solicitation and/or distribution of union literature are presumptively invalid, so far as such rule prohibit solicitation by employees during their nonworktime of other nonworking employees on the premises of the health care institution, other than "immediate patient care areas" or insofar as such rule prohibits the distribution of union literature by employees during their nonworktime in nonworking areas.

Respondent St. Francis adduced no evidence to establish that the rules "necessary to avoid disruption of health care operations or disturbance of patients." Inasmuch as these rules proscribed solicitation in all work areas, and there is no showing in the record that they are necessary to avoid disruption of health care operations or disturbance of patients, I find that Rules 52 and 56 are unlawful and overlybroad as they impermissively limit solicitation in work areas which are not primarily patient care areas, as alleged in the complaint.

Disparate Treatment

The complaint also alleges that, beginning on August 23 and continuing throughout the preelection campaign to October 26, Respondent St. Francis conducted a systematic antiunion campaign by engaging in a pattern of almost daily conduct during which its supervisors and/or agents met with RNs on the employees' worktime and in the employees' work area to discuss Respondent's antiunion literature and to otherwise persuade the RNs to reject the Union. In addition, during the same period, Respondent conducted antiunion group meetings with the RNs on their worktime. The complaint further alleges that, by registered letter dated September 26, the Union requested that Respondent provide to the Union equal time and access to employees in the voting unit to conduct meetings and to converse with them in ways comparable to those utilized by Respondent. Respondent St. Francis has failed and refused and continues to fail and refuse to grant the Union's request for equal time and access to employees in the unit.

I find that the evidence overwhelmingly supports the allegations and I find that Respondent St. Francis' conduct of coercive antiunion solicitation was not only violative of the National Labor Relations Act but violative of its own no-solicitation/no-distribution rules discussed above. Here the Employer itself engaged in antiunion solicitation which, if engaged in by employees, would constitute a violation of Rules 52 and 56. The Employer's conduct created an imbalance in the opportunities for organizational communication. Having found that the rules are illegal and independently violative of Section 8(a)(1) of the Act, I further find that the group meetings conducted by Administrator Rose and the many one-to-one encounters by the head nurses and other management persons with staff nurses violated those rules. Those rules prohibited legitimate union activities on Respondent St. Francis' premises by prohibiting lawful solicitation in nonpatient care areas on nonworktime. Respondent St. Francis violated the rules when it conducted its own antiunion campaign. Thus Respondent St. Francis' maintaining such rules and engaging in an antiunion campaign in violation thereof requires a remedy to eliminate the "imbalance." I will, therefore, recommend that Respondent St. Francis be ordered to grant equal access to its employees to the Union with no requirement that it pay for the employees' lost worktime. *N.L.R.B.* v. *United Steel Workers of America, CIO [Nutone, Inc.]*, 357 U.S. 357 (1958); *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

The Alleged Violation of Section 8(a)(3) of the Act

The complaint alleges that, on or about November 5, Respondent St. Francis violated Section 8(a)(3) of the Act by refusing to pay registration fees and grant time off to nurses Maureen Szymanski and Lois Mecklenberg

to attend a seminar approved for continuing education requirements.

The evidence reveals that Staff Nurses Council conducted a workshop for registered nurses on November 14. Sometime in October or early November, Szymanski and Mecklenberg submitted their applications to the nursing office to attend this workshop with pay, and for Respondent St. Francis to pay the registration fees. Mecklenberg testified that she asked the secretary in the nurses office of Respondent St. Francis if she could attend the seminar. The secretary told her that she did not see why not. "I should fill out the application and bring it out to the office." Mecklenberg did fill out the application form and took it to the nurses' office.

Supervisor Irene Myer called Mecklenberg a few days before the date of the seminar and asked Mecklenberg to come to the office. Supervisor Myer told Mecklenberg that she could not attend the seminar, that she had a note from David Rose stating that the hospital would not condone attending a seminar that was put on by the Staff Nurses Council. Supervisor Myer told her that she could attend on her own time and with her own money.

Szymanski's request was also denied. On November 5, Szymanski received a note signed by David Rose stating, "The hospital does not support seminars conducted by the Union," but that Szymanski could attend on her own time and money. Szymanski testified that she attended a seminar in 1978 conducted by the Staff Nurses Council on hospital time and paid for by Respondent St. Francis. Szymanski further testified that she had not previously had an application denied to attend a workshop and that her applications over the prior 12 years to attend workshops paid for by Respondent St. Francis had been approved. (Mecklenberg had worked for Respondent St. Francis only since January 1978 and had no past history concerning the attendance of workshops and seminars.)

The General Counsel contends that Szymanski's denial could not logically be based on the reason that the program was being offered by the Staff Nurses Council because she was authorized to attend a program conducted by that group in 1978. The only difference was that, in November 1979, Szymanski was known to be prounion. The General Counsel further contends that the only reason for the denial of Szymanski's request was her prounion role and therefore was in violation of Section 8(a)(3). Thus, having denied Szymanski's request, Respondent had no alternative but to also deny Mecklenberg's request even though she was not a known union adherent. The denial of Mecklenberg's request violated Section 8(a)(3) because it amounts to an employer discriminating against a group of employees in order to reach the prounion employees. In agreement with the General Counsel, I find that Respondent St. Francis, in denying Szymanski's and Mecklenberg's request to attend the seminar, violated Section 8(a)(3) and (1) of the Act.

The Unit

The complaint alleges and the answer denies that the unit of registered nurses was fully described in the Decision and Direction of Election and addendum thereto is appropriate for the purpose of collective bargaining. The description of the unit appears above.

On September 28, the Regional Director of Region 30 issued a Decision and Direction of Election, Case 30–RC–3611, finding the above-described unit to be an appropriate unit. Respondent St. Francis did not request review of this decision nor did it contend that a unit of registered nurses was inappropriate at the preelection hearing. Respondent St. Francis did not dispute the appropriateness of the above-described unit or present any evidence on that point during the instant proceedings. I find, therefore, that the unit described above and found to be an appropriate unit in the Decision and Direction of Election and the addendum to be an appropriate unit. *National Medical Convalescent of San Diego d/b/a Ojai Valley Community Hospital*, 254 NLRB 1354 (1981); *Newton-Wellesley Hospital*, 250 NLRB 409 (1980).

The Current Majority

The General Counsel contends that, as of September 22, the Union has represented a majority of the nurses in the appropriate unit for purposes of collective bargaining. The record reveals that, on August 6 and 14, Union Representative Schwartz conducted meetings with nurses employed by Respondent St. Francis. At those meetings Schwartz read the language on the authorization card to the employees and explained that, by signing the card, the employee has designated the Union as his or her collective-bargaining representative. He also informed the nurses on the contact committee of the proper procedure for asking other nurses to sign this card. Schwartz told the nurses that the card means what it says, designation of bargaining representative, but if a petition for election is filed with the National Labor Relations Board the card could be used as a showing of interest. On or about August 21 or 22 Schwartz received the completed and signed cards from the contact committee.

The Union had received 123 signed authorization cards and on that date Respondent St. Francis stipulated that the signatures on the cards were genuine. To establish majority status, the General Counsel offered a list of names and addresses (*Excelsior* list) for the payroll period ending September 22. The list contains 207 names which means that, as of September 22, 123 out of the 207 unit employees signed authorization cards.

On its face, the authorization card clearly designates the Union as the collective-bargaining representative. The card contains no reference to an election although, as indicated above, Schwartz referred to the possible use of the cards in an election petition. Schwartz did not state that the card was to be used only for an election nor did he in any other manner misrepresent the purpose of the card. Thus, with the stipulation of authenticity of the signatures and the General Counsel having established the validity of the cards, the burden of proof shifted to Respondent St. Francis to establish that the cards were not valid. Respondent St. Francis presented no evidence to challenge the validity of the authorization cards. Therefore, I find that the cards are valid and the record establishes conclusively that, as of September 22,

the Union has represented a majority of the nurses in an appropriate unit for the purpose of collective bargaining. *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

V. RESPONDENT MODERN MANAGEMENT, INC.

The complaint in Case 30–CA–5698 alleges that, through various acts committed by supervisors of Respondent St. Francis, Respondent 2M violated the National Labor Relations Act.[11] The General Counsel alleges that Respondent 2M was responsible for and controlled the antiunion campaign described above or was the co-manager of said campaign with Respondent St. Francis. The 8(a)(1) violations alleged in the complaint against Respondent 2M are identical to most of those alleged against Respondent St. Francis. It alleges that supervisors and management persons associated with Respondent St. Francis named in the complaint are also supervisors and/or agents of Respondent 2M and a finding of 8(1) violations by those supervisors and management persons is a finding that Respondent 2M and Respondent St. Francis are equally responsible and in violation of that section of the Act.

In other words the General Counsel has proceeded on a totally new theory: that because Respondent 2M "was responsible for and controlled the campaign" it constituted the "principal and/or manager" or at least a "co-principal and/or co-manager" of the campaign and is legally responsible for some, although not all[12] the alleged unlawful acts committed by hospital supervisors.

As previously indicated, the issue with respect to Modern Management is whether it is responsible for the acts of supervisory registered nurses, employees of Respondent St. Francis, to whom it provided advice and instruction. Respondent 2M contends that it cannot be held responsible for acts committed by the supervisory employees of Respondent St. Francis as a matter of law in the absence of a specific allegation that it was acting as an agent of St. Francis. The General Counsel argues that Respondent 2M is responsible for and controlled the antiunion campaign or as co-manager and that the supervisors are supervisors and/or agents of Respondent 2M. The Charging Party contends that, given the fact of control by Respondent 2M over these supervisory employees, sound public policy and the plain meaning of the words in the National Labor Relations Act require a finding that Modern Management is responsible for these acts. Apparently, this issue has not been resolved in any previous Board decision.

Respondent 2M meets the Board's jurisdiction standards and has admitted that it is an employer engaged in commerce within the meaning of the Act. Accordingly, the Board has jurisdiction over it. At the hearing held from April 20 through April 23, most of the testimony presented concerned the role of Respondent 2M in the union campaign at Respondent St. Francis. Testifying under subpoena from the General Counsel were Larry Kruger, chairman of the board of the hospital; William Van Clief, the comptroller; William Smith, the vice president in charge of employee relations; Joe Jendusa, administrative employee; and Rose Reitz, the director of nursing. Chairman Kruger testified that Respondent 2M was hired in the summer of 1979 on the recommendation of Sister Michelle, then the president of the hospital. He said that the basis for the hiring of Respondent 2M was the serious problems of employee morale at that time in the hospital. Apparently, the union organizational campaign by groups of employees including registered nurses going on at the time had an effect on employee morale. During the contractual relationship between the Respondents none of the hospital's administrative personnel assumed or exercised any supervision over the employees of Respondent 2M.

Respondent 2M was introduced to the administrative supervisory personnel at the hospital at group meetings that occurred in late August through early September 1979. Chairman Kruger introduced Respondent 2M representatives by name and disclosed that they were there to help the administrative and supervisory employees with the organizational campaign that was then in progress.

After the initial meeting, at which the chairman of the board and president of the hospital were present, representatives of (employees) of Respondent 2M met in small groups and in individual meetings with Respondent St. Francis' supervisory personnel from early September through October 26, the date of the election. Four of Respondent 2M's representatives, including Robert Williams, staff manager; Ed Young, associate; James Bannon, principal; and Norman Weisman, associate, were at the hospital on almost a daily basis during the course of the campaign. They were given the use of various rooms in the administrative wing of the hospital and were permitted to utilize the secretaries to contact supervisory registered nurses. They met with the supervisory employees in small groups of approximately five to eight people and in individual meetings. The meetings occurred approximately once or twice per week starting in September, but increased in frequency as the election date approached. They met with the supervisors on a daily basis the last 10 days prior to the election. In addition, supervisory employees were encouraged to contact Modern Management representatives if they had questions. Supervisors seeking a Respondent 2M representative would go to the rooms in the administrative wing where they were located or, if they were not there, they would ask the administrative secretaries to page them.

[11] The charge against Respondent 2M was filed by the Union on March 5, 1980. It alleged that Respondent 2M, "for itself and as an agent of St. Francis Hospital, had engaged in various conduct violative of Section 8(a)(1), (3) and (4) of the Act." Seven months thereafter, on October 6, 1980, the Regional Director dismissed that charge in its entirety. He concluded that 2M had not directly committed any "violative conduct" and that, with respect to the alleged agency, that 2M had neither instructed the hospital supervisors to commit unfair labor practices nor had it been given "complete authority to speak and act on [the hospital's] behalf in all situations" involving the union campaign. Two weeks later, without stating reasons, the Regional Director revoked his dismissal and issued the instant complaint against Respondent 2M alleging that Respondent 2M violated Sec. 8(a)(1) of the Act.

[12] The 8(a)(1) allegations involving 2M are identical to those in par. II(2) of the complaint against the hospital. However, Respondent 2M is not alleged to have been a "co-manager" or "co-principal" with respect to the other 8(a)(1) or 8(a)(3) allegations against the hospital; for example, the alleged improper wage increase; the alleged *per se* illegal and disparate no-solicitation rule enforcement, and the allegedly improper denial of seminar expense reimbursement.

Joan Boho testified that on several occasions when she had questions of Respondent 2M personnel she asked a hospital secretary to page them. On each occasion, she succeeded in contacting them through the page.

During the course of numerous conferences between the supervisory personnel and Respondent 2M representatives the supervisors were given reading matter to be distributed to the employees. They were asked to pass out this literature to individual employees and to ask them what they thought about the written materials. These contact efforts lasted between 5 minutes and an hour depending on the availability of the employees. Most of the contacts were on the supervisors' and employees' worktime. The supervisors were asked by Respondent 2M representatives to report back to them concerning the employees' reactions to the individual written matter. When making these reports to Respondent 2M representatives, the supervisors would, on occasion, give the names of employees along with their reactions to the literature. There is no evidence that any of the supervisors were told to stop that practice. Supervisor Irene Meyer asked at least 12 employees about their feeling towards the Union and reported them to Respondent 2M representatives. She was not advised to stop this activity by either Respondent 2M or Respondent St. Francis representatives. The preponderance of the evidence establishes condonation of the illegal practice by Respondents.

Within 2 or 3 days of the election the representatives of Respondent 2M met with several supervisory employees and discussed the prospect for a no-union vote. Respondent 2M representatives had a list of employees before them and stated that the election would be close, but that the "hospital would win." They discussed the leanings of individual employees and asked supervisors to contact certain employees prior to the scheduled election in order to influence their votes.

The evidence indicates that none of the supervisory employees of Respondent St. Francis had previous experience concerning union organizing campaigns. They relied on the advice and instructions of Respondent 2M representatives in dealing with the employees. The supervisors who testified stated that the only instructions concerning their one-to-one contact with employees came from representatives of Respondent 2M. No direct instructions on handling employee contacts came from the hospital administrative staff. Rose Reitz, vice president of nursing services, was treated as any other supervisory employee by Modern Management representatives.

Much of the literature distributed to the employees of Respondent St. Francis by the supervisors was signed by Bill Smith, Respondent St. Francis' vice president of personnel services, and under the letterhead St. Francis Hospital. Some of the literature was written on plain paper with no letterhead. Certain literature distributed by Respondent 2M to the supervisors (and not for redistribution) informed the supervisors what they could legally do and not do as supervisors during the campaign.

Joe Jendusa testified that at least four of the supervisory personnel at the hospital had come to him with regard to their concerns about what they were asked to do by Respondent 2M. Jendusa advised them that they should cooperate with and follow the instructions and directions of Respondent 2M personnel. Renata Alonte, one of the above four supervisory employees, when questioned about her conversation with Jendusa, said she could not remember whether or not such a conversation took place.

None of the supervisory nurses who testified could remember in great detail what occurred in the group or individual meetings. However, it is undisputed that they were given instructions by Respondent 2M personnel on how to approach employees, what to say, and how to respond to questions. They, for the most part, followed the advice and carried out those instructions. They said they relied on Respondent 2M representatives to advise them on what they legally could or could not do. Notwithstanding, they did violate the Act on occasion, as indicated above. Through its advice and instructions Respondent 2M effectively directed the campaign and established the tactics to be used by the supervisors. It appears that Respondent St. Francis gave Respondent 2M practically full control of the antiunion campaign. Respondent 2M representatives called the meetings, passed out the literature, and shaped the strategy of the entire campaign from offices on the hospital premises. They made reports to Respondent St. Francis concerning what was being done.

An example of the extent of the authority that was delegated to them by Respondent St. Francis was their ability to call a supervisory nursing personnel to numerous meetings without the approval of any of Respondent St. Francis' officials. They were able to instruct, advise, and direct the supervisors and, in effect had almost complete control of the campaign. As testified by Alonte, the supervisors met with Rose in September at which time he expressed his antiunion philosophy, announced the pay increase, and promised future improvements at the hospital. But, he did not instruct them on responding to the union campaign; nor did he do so in any literature.

The General Counsel contends that the evidence establishes that Respondent St. Francis "abdicated" its authority in combating the Union and gave this authority to Respondent 2M; that Respondent 2M exercised full control for the antiunion effort by controlling the activities of the supervisory registered nurses; and that Respondent 2M became the employer or co-employer of the supervisors.

On the other hand, Respondent 2M argues that inasmuch as the complaint does not allege that Respondent 2M directly engaged in misconduct or committed unfair labor practices *as an agent* of the hospital it cannot be held liable for the unfair labor practices committed by the supervisors of Respondent St. Francis. The supervisors are employees of Respondent St. Francis and not of Respondent 2M. Respondent 2M also argues that the refusal of the General Counsel to proceed on an agency theory is based on the lack of evidence that the agent directly committed the unfair labor practices and cites *National Welders Supply Co.*, 132 NLRB 660 (1961), and *Sierra Academy of Aeronautics, Inc.*, 182 NLRB 546 (1970). In the present case, there is neither an allegation

nor any evidence to show that representatives of Respondent 2M directly unlawfully threatened, interrogated, or promised benefits to employees, or even had any direct contact whatsoever with nonsupervisory employees.

Respondent 2M further argues that the act imposes liability on an employer, such as Respondent 2M, who does not employ the employees involved in the labor dispute, only where the separate respondent either had control over the rights alleged to have been coerced or restrained (*Fabric Services, Inc.*, 190 NLRB 540 (1971); *A. M. Steigerwald Co.*, 236 NLRB 1512 (1978)), or in some instances where he instructed or directed the commission of unfair labor practices. See *Dews Construction Corp., a subsidiary of the Aspin Group, Inc.*, 231 NLRB 182, fn. 4 (1977), enfd. 578 F.2d 1374 (3d Cir. 1978).

The latter situation is not even alleged here. With respect to the former, there is no record evidence that shows that Respondent 2M could make or implement any employment decisions on behalf of the hospital or assume or exercise any of its managerial rights or duties. Respondent 2M was retained as and acted solely as an advisor to the hospital.

Here, Respondent St. Francis supervisors were instructed by Respondent St. Francis to accept the advice and carry out the instructions of Respondent 2M representatives. In that respect, their instructions came from Respondent St. Francis and not from Respondent 2M. The evidence reveals that none of the supervisors considered herself as an "employee" of Respondent 2M. By attending the meetings called by Respondent 2M representatives, the supervisors were following the instruction of Respondent St. Francis and, likewise, in carrying out the instructions given to them from Respondent 2M representatives, they were following the instructions of Respondent St. Francis. Consequently, if they refused or failed to accept the advice and carry out the instructions of the representatives of Respondent 2M, their punishment would come from Respondent St. Francis (their employer) and not from Respondent 2M. Likewise, St. Francis and not from Respondent 2M.

Thus, the employer-employee relationship which existed prior to the coming of Respondent 2M on the scene continued to exist after the advent of Respondent 2M. If, instead of instructing its supervisory employees to heed the advice and follow the instructions of the representatives of Respondent 2M, Respondent St. Francis' president had chosen to locate the representatives of Respondent 2M near his office and himself accepted the advice and instructions of Respondent 2M and passed such down to the supervisors rather than arrange for Respondent 2M representatives to deal directly with the supervisors, it would be difficult to argue that Respondent 2M is a co-employer. I do not believe that the arrangement that existed here warrants a different conclusion. Respondent 2M acted as an advisor or consultant and not as a co-employer. Inasmuch as agency is not alleged in the complaint, I do not find it necessary to decide that question.

The supervisors violated Section 8(a)(1) of the Act by their interrogations and promises. Their feedback established condonation of this conduct by Respondent 2M and by Respondent St. Francis to whom Respondent 2M reported. Respondent St. Francis must bear the entire responsibility for the "anti-union" or "union busting" campaign allegedly controlled and conducted by Respondent 2M. Respondent 2M was engaged by Respondent St. Francis as a consultant for advice and instructions to defeat the union organizing campaign. It chose to accept the advice and act upon it when it instructed its supervisory personnel to heed the advice and carry out the instructions of the representatives of Respondent 2M. By giving such instructions to its supervisory employees, Respondent St. Francis was, in effect, acting on the advice and pursuant to the instructions of its consultant, Respondent 2M.

I am convinced that from a public policy viewpoint there is no basis for imposing liability upon Respondent 2M, inasmuch as the role of 2M in this case was that of a labor relations advisor to the hospital. There is no evidence that it advised its client to violate the Act. To hold Respondent 2M liable in these circumstances would constitute a serious intrusion into an employer's right to seek legal advice. In that regard, public policy has encouraged not discouraged obtaining professional assistance. If the General Counsel's theory is adopted, the effect would be to discourage a party from seeking such advice, whether it be from a law firm, labor relations consultant, or any other professional source. The result would very well be the commission of more, rather than fewer, unfair labor practices by uninformed parties.

The Board has held that an independent Respondent can be held liable for acts committed with respect to employees other than his own only if that respondent possessed "sufficient control over the Section 7 rights alleged to have been restrained or coerced." *Fabric Services, supra.* In order, for example, to impose 8(a)(1) liability for unlawful threats or promises, the respondent must have the power to effectuate those alleged threats or promises. Thus, in *Fabric Services,* the Board held that a Respondent which had instructed an employee of another employer to remove a union insignia from his uniform as a condition for performing services in respondent's plant violated Section 8(a)(1). The Board's rationale was the control "exerted" by the respondent, notwithstanding that he was not the employer of the employees involved:

> [B]y virtue of its ownership of the property and its power to evict [the employee] from its premises, [the Respondent] was in a position of sufficient control effectively to enforce its direction to [the employee], in substance, either to remove his union pocket protector or get off its property and cease performing the work his employer had assigned him. [190 NLRB at 542.]

In *A. M. Steigerwald Co., supra,* the Board followed *Fabric Services* by applying the same "control" test to determine whether a credit union could coerce or restrain Section 7 rights of employees other than his own. The credit union had sent a letter to the employees of an employer whose work force a union was attempting to organize stating that, if the union won the election, the em-

ployees would not be able to obtain future loans, and that individuals who were not presently members of the credit union would be ineligible to join. As in *Fabric Services*, by virtue of its power to deny future loans and membership, the credit union's threat to invoke that power violated Section 8(a)(1). In *Scott Hudgens*, 192 NLRB 671 (1971), the owner of a shopping center was held in violation of Section 8(a)(1) by threatening to have employees of another employer located within the shopping center arrested because they were trespassing on private property; by virtue of its ownership, the owner had the power to carry out the threat.

The evidence in the instant case demonstrates that Respondent 2M did not, directly through its representatives, commit the unfair labor practices nor did it possess the requisite "control" over the hospital or its employees, to effectuate the alleged unfair labor practices committed by the employees of the hospital. In addition, there is no evidence that Respondent 2M had instructed the supervisors to engage in unlawful interrogation although there is much evidence that it instructed the supervisors to engage in daily conversations with the staff nurses which resulted in unlawful interrogation committed by the hospital employees. Certainly, Respondent 2M knew what was going on as did Respondent St. Francis.

I find that Respondent St. Francis had control of the antiunion campaign in the hospital and that it was acting on the advice and instructions of a consultant, Respondent 2M. Even if, *arguendo*, Respondent 2M's representatives advised Respondent St. Francis' supervisors to commit unfair labor practices, whether such advice is *per se* an unfair labor practice and, as such, subjects a labor consultant to the Act's remedial process is a question which has not been resolved by the Board. Moreover, there is evidence that Respondent 2M personnel did try educating the supervisors on how to obey the law. They were requested to "report back" the nurses' "general reactions" to the hospital campaign literature. There is no evidence that the supervisors were instructed to ask the nurses how they intended to vote (most of them wore buttons signifying their sympathies for or against). Likewise, there is no evidence that they were told to mention employee names when reporting the general reactions.

In *The National Lime and Stone Company*, 62 NLRB 282 (1945), the employer, whose employees were attempting organization, retained the services of Labor Relations Institute, a partnership engaged in the distribution of a semimonthly publication entitled "Practical Problems in Labor Relations." It maintained a field staff which performed various services such as wage and salary stabilization, negotiation of contracts with unions, installation of merit rating systems and personnel "setups," foreman training, job evaluation and analysis, labor surveys, and the like. National employed the Institute for the purpose of making a survey of working conditions at its plant and to investigate the causes of dissatisfaction on the part of its employees. The Institute was solely a management representative organization. The Board in that case stated:

> There is no contention, as such, that National is not responsible for the conduct of the Institute or that the Institute is not an employer within the meaning of the Act. However, as indicated above . . . National employed the services of the Institute shortly after the Union had filed its petition for investigation and certification of representative; General Manager Love authorized the Institute's representatives, Bladek and Hardy, to go among the employees and speak to them; Love introduced Bladek and Hardy to assembled groups of employees in National's plant, thereby sponsoring talks of the Institute's representatives to the employees on such occasion; and Hardy signed the stipulation for consent election, mentioned above, as "agent" for National. [62 NLRB 298, fn. 26.]

The Board concluded that, under all the circumstances, the Institute acted in the interest of National and was therefore an employer within the meaning of Section 2(2) of the Act, and that National was also responsible for the acts and statements of the Institute. After finding that both were responsible for the unfair labor practices committed, it ordered both to cease and desist therefrom and to post notices for the employees of National.

That case is distinguishable from the instant case in that the Institute's representatives dealt with the rank-and-file employees of National and committed the unfair labor practices against those employees directly and not through National's own supervisory employees. In addition, unlike the instant case, the Institute was alleged to be an agent of National and was so found.

Accordingly, I find that the General Counsel has not established by a preponderance of the evidence that Respondent 2M is a co-employer or co-manager of the supervisors employed by Respondent St. Francis and therefore liable along with Respondent St. Francis for the illegal conduct alleged. I shall therefore recommend dismissal of the allegations of the complaint against Respondent 2M.

Further Discussion and Conclusions[13]

As previously stated Administrator David Rose announced, at a mass meeting on October 11, and followed up by a letter dated October 12 (14 days before the election), that the employees would be given a raise of 10 percent effective November 4, a merit increase of up to 7-1/2 percent effective January 1, 1980, and a review of economic conditions in July 1980.

The granting of a wage increase during the union organizing campaign and shortly before a scheduled election as was the case here raises a strong presumption that such increase was intended to, and in fact did, interfere with the employees in violation of their Section 7 rights. *Rich's of Plymouth, Inc.*, 232 NLRB 621 (1977). A promise or grant of benefits during a critical preelection period has been held to be illegal unless the employer proves a valid business explanation for the timing of the granting or promising of such benefits. In other words, the burden was on Respondent St. Francis to prove that it had no desire to influence the employees' freedom of

[13] Briefs which were submitted by all the parties have been thoroughly considered along with the entire record.

choice in the election campaign. *Dravo Lime Company*, 234 NLRB 213 (1978).

I am persuaded that the defense of business justification offered by Respondent St. Francis is pretextual. Administrator Rose testified that the nurse shortage affected the whole Milwaukee area and that two units had been shut down in August. He also testified that he was not aware of the turnover rate for nurses at St. Francis, or how it compared with other hospitals in the area, and that the turnover rate was not a consideration in determining the amount of the pay raises.

Although Respondent St. Francis offered evidence proving that it considered granting the nurses a pay raise a month before the Union's organizational campaign, it did not explain why a pay raise was in fact granted 2 weeks before the scheduled election. On July 3, Personnel Vice President Smith recommended an increase in the starting rate for nurses but no action was taken on the recommendation. In addition, on August 22, Smith prepared a memorandum showing the cost of a wage increase for all employees which he submitted to his superiors with a request that a decision on whether to grant a raise be made within 10 days. Again no action was taken on that request.[14]

Respondent St. Francis' supervisors apparently expected that the pay raise and promises would discourage the nurses' union activities. As previously discussed, on October 15 nurse Hanson in a conversation with her supervisor, Nancy Sykora, stated, "You have your 10 percent wage, what else could you possibly want? Mr. Rose gave you your 10 percent, what else do you want, what else could you possibly want besides your money?"

I find that the implementation of the 10-percent raise and Rose's October 12 letter violated Section 8(a)(1) of the Act in that such actions were taken with the express purpose of influencing the employees' freedom of choice for unionization and was reasonably calculated to have that effect. The problems with wages and shortages of nurses preceded the Union's organizing campaign, but it was the organizing campaign which caused Respondent St. Francis to act on granting the wage increase and making the promises when it did. *Westminister Community Hospital, Inc.*, 221 NLRB 185 (1975).

The Interrogations, Promises, and Threats

Numerous incidents discussed above between various supervisors and employees in support of the allegations of interrogation, promises, and threats prove that in each incident Respondent St. Francis interfered with the employee's rights protected by Section 7 of the Act.

As an example, in each incident in support of the allegations concerning interrogation, a supervisor asked a staff nurse why the employees wanted the Union, how she felt about the Union, or questions concerning the employees' protected concerted activities.

In support of the allegations of promises the evidence proves that nursing supervisors and management personnel repeatedly promised the staff nurses improved benefits and conditions of employment in order to dissuade them from supporting the Union. The basic theme was that the nurses' grievances would be resolved without a third party (the Union) if they gave the new management headed by Rose a chance. Supervisor Sykora's statement to nurse Hanson on October 15 about the pay raise was meant to show that management had already started its campaign to improve wages and working conditions.

The timing, content, and frequency of the statements to the staff nurses following morning meetings concerning the campaign with representatives of Respondent 2M prove that they were calculated to interfere with the employees' freedom of choice. In effect, staff nurses were being told by the supervisors that, if management fails to give the employees everything they want within 1 year, the nurses can again seek union representation. This basic theme was repeated during the entire 2 months prior to the election and was included in Rose's speech to the nurses 2 days before the election. Although the promised benefits were not always specifically enumerated, the message was clear that management would improve conditions if the nurses rejected the Union. *Royal Petroleum Corporation*, 243 NLRB 508 (1979); *Hubbard Regional Hospital*, 232 NLRB 858 (1977).

With respect to the alleged threats also previously discussed, the staff nurses were threatened with changes in working conditions and loss of previously obtained benefits if they selected the Union to represent them. Supervisor Rose made the astonishing statement to the nurses, at a time when they were operating under great stress during the antiunion campaign conducted by Respondents, that if the Union wins Respondent 2M stays and if the Union loses Respondent 2M goes. Supervisors told nurses that union representation would be futile and that the nurses would lose wages and benefits if they chose the Union. The threats contain a single message that if the nurses chose the Union as their collective-bargaining representative they would be made to regret it. I find such conduct to be in violation of Section 8(a)(1). In finding all of the discussed incidents to be in violation of Section 8(a)(1), I am mindful of the timing and the repetitiveness of this concentrated and mass effort on the part of the supervisors which created a stressful situation while the nurses were at work. Many of the conversations took place while the nurses were ministering to their patients and often in emergency situations. Although the remarks at times appeared casual or offhand they followed a certain pattern and were often made when the nurses were either too busy or not interested in listening to their supervisors on the subject. In that context, the interference with the nurses' free choice is clear. Often they were under duress and in fear of retaliation if they did not listen to their supervisors. In addition to finding each incident a violation of Section 8(a)(1) of the Act, I find, as previously stated, and in agreement with the General Counsel, that Respondent St. Francis' campaign of frequent and intensive meetings on a one-to-one basis by the supervisors and other management persons with the nurses was in reality a manner of interrogation in support of paragraph C,II,2(d) of the complaint. Accordingly, I find that Respondent St. Francis' antiunion

[14] The nurses were not told of either memo.

campaign independently and as a whole violated Section 8(a)(1) of the Act.

A Bargaining Order Is Warranted

The General Counsel contends that the likelihood of Respondent St. Francis' illegal conduct recurring during the period preceding the ordered rerun election is clearly present inasmuch as the illegal acts occurred before and continued after the Union filed its representation petition.

I agree with the General Counsel that the possibility of erasing the effects of Respondent's unfair labor practices and of ensuring a fair election by the use of traditional remedies is slight. Respondent's conduct involves long-term coercive effects upon the employees' free choice. The granting of a pay increase, numerous promises, numerous threats, and the discriminatory denial of two nurses' attendance of a training seminar, contrary to past practice, is conduct that the Board and the courts have long classified as misconduct going "to the very heart of the Act." *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Supreme Court approved the Board's use of bargaining orders as remedies in cases marked by substantial employer misconduct which has the "tendency to undermine [the Union's] majority strength and impede the election process." The Court held that, where the union had at one time enjoyed majority support among the employees, the Board, in fashioning a remedy, can properly consider:

> . . . the extensiveness of an employer's unfair labor practices in terms of their past effect on the election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . . . [395 U.S. at 614–615.]

In the instant case a clear majority of unit employees had signed authorization cards designating the Union as their collective-bargaining representative. Respondent St. Francis, as previously indicated, engaged in numerous unfair labor practices, including promising and granting benefits for the purpose of discouraging union activities, threatening reprisals and denial of certain benefits, making extensive interrogations, and maintaining illegal no-solicitation rules. The conclusion is inescapable that this extensive campaign of egregious unfair labor practices has had the tendency to undermine the Union's strength and impede the election process. *Faith Garment Company, Division of Dunhall Pharmaceutical, Inc.*, 246 NLRB 299 (1979).

Therefore, for all the above reasons, I conclude that the employees' sentiment, once expressed through authorization cards, would, on balance, be better protected by the issuance of a bargaining order than by traditional remedies. *C. E. Wilkinson & Sons, Inc.*, 255 NLRB 1367 (1981); *Red Oaks Nursing Home, Inc.* v. *N.L.R.B.*, 633 F.2d 503 (7th Cir. 1980).

V. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section IV, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

Having found that Respondent St. Francis has engaged in and is engaging in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including the granting of a bargaining order and posting notices.

CONCLUSIONS OF LAW

1. Respondents St. Francis Hospital and Modern Management, Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All registered nurses employed by the Employer, including assistant head nurses, in-service instructor, utilization review coordinators, discharge planner, infection control nurse and patient teachers, but excluding office clerical employees, technical employees, in-service coordinator, head nurses, quality care coordinator, guards and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. By maintaining an unlawful no-solicitation rule; by discriminatorily enforcing such a rule; by promising and granting its employees economic benefits for the purpose of discouraging union activities; by threatening its employees with reduced benefits; by interrogating employees concerning their own or other employees' union membership, activities, and desires; by threatening employees with unspecified reprisals if they did not refrain from further union activities; by engaging in a stressful antiunion campaign against its employees; and by denying the Union's request for equal time and access to employees, Respondent St. Francis engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. By denying employees compensation and fees to attend training classes, Respondent St. Francis has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
6. Since September 22, 1979, the Union has represented a majority of the employees in the above-described appropriate bargaining unit, and since that date the Union has been the exclusive bargaining representative of said employees within the meaning of Section 9(a) of the Act.

7. The above-described unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

8. Respondent Modern Management is not an employer or principal, or co-employer or co-manager, responsible for committing any unfair labor practices, as alleged in the complaint.

Upon the foregoing findings of fact and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[15]

The Respondent, St. Francis Hospital, Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Announcing general wage increases, COLA increases, merit wages programs, interrogation threats, and promises of benefits to employees in violation of Section 8(a)(1) of the Act.

(b) Maintaining in effect the no-solicitation Rules 52 and 56 quoted herein.

(c) Denying the Union's request for equal time and access to employees in violation of Section 8(a)(1) of the Act.

(d) Denying employees compensation and fees to attend training classes in violation of Section 8(a)(3) and (1) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with the Union as exclusive bargaining representative of the employees in the appropriate bargaining unit described above and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Accord the Union the opportunity to have group meetings with employees on the premises of the Employer during worktime comparable to those held by the Employer.

(c) Post at its premises in Milwaukee, Wisconsin, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by an authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent St. Francis to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act by Respondent Modern Management, Inc.

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[16] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."